To: Donna Caton

FROM: David Gilbert, Administrative Law Judge

DATE: October 26, 2001

RE: Docket 01-0562

Midwest Generation, LLC -vs- Commonwealth Edison Company

Complaint as to unjust unreasonable, and anti-competitive energy and capacity charge for station power, request for refunds, with interest, and other relief.

ADMINISTRATIVE LAW JUDGE'S RULING

In this proceeding, Midwest Generation, LLC ("Midwest") filed a Complaint requesting that certain charges imposed upon Midwest by Commonwealth Edison Company ("ComEd") for station service be found unjust, unreasonable and anti-competitive. Complaint, at 7. Midwest further requests refund of "all sums paid by Midwest to ComEd for power and energy, and related taxes." *Id*. Additionally, Midwest asks that ComEd be required to net any station service provided in the future on a monthly basis. *Id*.

ComEd filed both a Verified Answer and a Motion to Dismiss the Complaint ("Motion"). Insofar as the Complaint requests a finding that the subject charges for station service are unjust, unreasonable and anti-competitive, and insofar as it requests refund, the ComEd prays that it be "dismissed for want of jurisdiction, or, alternatively, denied for lack of merit." Motion, at 15. ComEd asks that Midwest's prayer for monthly netting also be "denied for lack of legal merit." *Id*.

Midwest filed a Response to Commonwealth Edison Company's Motion to Dismiss ("Response"), and ComEd filed a Reply of Commonwealth Edison Company in Support of its Motion to Dismiss the Complaint ("Reply").

Midwest cites authority to establish the legal principles by which a motion to dismiss must be assessed. In sum, those authorities require that the complainant's well-pled facts must be taken as true, that any reasonable inferences from those facts must be drawn in complainant's favor, and that the complaint will not be dismissed if facts might be proven that would entitle the complainant to prevail. Response, at 3. On the other side of the coin, a claim should be dismissed when all of its pleaded facts and reasonable inferences are assumed to be true, yet it still fails to set forth a basis for relief. It is also settled that a dismissal motion must be decided on the basis of facts

pleaded in the complaint, without reference to facts yet to be placed in evidence. The Motion here will be evaluated in light of the foregoing principles.

Midwest alleges that in December 1999 it executed certain Auxiliary Power Agreements ("Agreements") with ComEd, pursuant to which ComEd would provide station power and capacity for power generation facilities that Midwest had agreed to purchase from ComEd. Complaint, at 2. According to Midwest, it was obliged by ComEd – despite Midwest's objections - to enter into the Agreements in order to consummate the purchase of the generation facilities. *Id*. Midwest further avers that it "objected to the imposition of the station service rate for power and energy" in December 1999 and continues to object today. *Id*., at 2-3.

Midwest also asserts that in March 2001, the Federal Energy Regulatory Commission ("FERC") "concluded that a utility cannot require, as a condition to the sale of generating facilities, that the purchaser buy [station service] from the selling utility." *Id*., at 3, citing PJM Interconnection, LLC, 94 FERC 61,251 (2001) ("PJM II") and Order Denying Rehearing and Providing Clarification, 94 FERC 61,333 (2001) ("PJM III"). Midwest contends that these FERC rulings preclude ComEd from requiring Midwest to obtain station power pursuant to the Agreements. Midwest additionally maintains that it is capable of self-supplying its station power. *Id*., at 4.

Based on the preceding facts and FERC rulings, Midwest concludes that the requirement to purchase station power under the Agreements, and the rate at which such power is provided, are unjust and unreasonable within the meaning of Section 9-101 et seq. of the Act, are anti-competitive "in contravention to the legislative intent found in Section 16-101A," and warrant a refund of more than $24.6 million previously paid for capacity and energy. *Id*., at 5-6.

Commission Jurisdiction Regarding Contracts

ComEd asserts that the station power services provided under the Agreements are "contract services" within the meaning of section 16-102 of the Public Utilities Act ("Act"), and that contract services are included among "competitive services" by Section 16-102. ComEd then emphasizes that competitive services are exempted by subsection 16-116(b) from the provisions of Article 9 of the Act on which Midwest bases its claim of unjustness and unreasonableness. Motion, at 6-7. Midwest counters that "the Agreements are bundled contracts that provide for a wide array of otherwise tariffed, non-competitive services." Response, at 5.

Both ComEd's Motion and Midwest's Response overlook the absence of the Agreements from the evidentiary record at this stage of the proceeding. Without the contracts in hand, the Administrative Law Judge cannot infer, much less determine, whether they contain terms that would place them (or portions of them) outside the Commission's Article 9 jurisdiction. While the parties apparently concur that the Agreements concern "bundled" services[1], the identity of the services in the bundle, and,

[1] Motion, at 6.

therefore, the legal status of those services under the Act, cannot be discerned without examining the Agreements.

As an abstract legal question, the mere fact that the Complaint concerns contracts does not necessarily deprive the Commission of authority to entertain Midwest's claims. Since, as the Complaint alleges, the Agreements were entered into before January 1, 2001, they may be subject to the provisions of Section 9-102.1 and, in turn, to other provisions of Article 9. Similarly, the Agreements may contain terms for delivery services, which are expressly removed from the definition of "contract services" and "competitive services"[2] by Section 16-102. Moreover, under Section 16-102, "contract service does not include electric utility services provided pursuant to…contracts that retail customers are required to execute as a condition of receiving tariffed services." In view of the coercive circumstances that Midwest claims to have been prevalent when the Agreements were formed, this provision may apply to the present case. At this procedural stage, and without the Agreements in evidence, the foregoing determinations cannot yet be made.

With particular regard to delivery services, ComEd emphasizes that Section 16-102 defines such services, in pertinent part, as "those services provided by the electric utility that are necessary in order for the transmission and distribution systems to function so that retail customers located in the electric utility's service area can receive electric power and energy *from suppliers other than the electric utility*." Reply, at 6 (emphasis added by ComEd). From this, ComEd argues that the use of *its own* transmission and distribution facilities to deliver energy under the Agreements is "consistent with Section 16-102." The meaning of this argument is not altogether clear, but if ComEd's point is that the use of its own facilities to deliver energy falls outside of the statutory definition of delivery services, it is incorrect. The statutory language ComEd emphasizes is simply part of the functional description of what constitutes delivery service, not an excision of electric utilities from that definition. Indeed, the definition explicitly refers to services provided "by the utility." Therefore, if delivery services are included in the Agreements, it may be that the Agreements concern, in part, non-competitive services.

Accordingly, it cannot be determined solely from the face of the Complaint that the Commission lacks authority to grant relief pertaining to the Agreements simply because they are contracts.

Just and Reasonable Conduct

According to ComEd, "Midwest alleges no violation of Illinois law other than that the contracts are supposedly unjust and unreasonable by virtue of their supposed violation of the PJM decisions." Motion, at 9. Expanding on this point, ComEd stresses that the PJM decisions "involved construction by the FERC of provisions of the Federal Power Act, not the Illinois Public Utilities Act…[and were] related to FERC tariffs, and

[2] Delivery services will not be competitive until approved as such by the Commission pursuant to Section 16-113.

utilities that did not involve or relate to ComEd." Reply, at 10. Consequently, ComEd avers, the PJM decisions "did not involve allegations of any violation of the [Act], any Commission regulation, or order of the Commission, which allegations are required in order to state a complaint under Section 10-108 of the Act." *Id*., at 10-11.

ComEd accurately characterizes the PJM decisions. However, that does not mean that the Complaint must be dismissed for failure to assert a cognizable claim. The Complaint was filed pursuant to Section 10-108, which authorizes the Commission to consider claims that a party has violated "any provision of this Act." The particular provisions allegedly violated reside in Article 9. Section 9-101 requires that a utility's rates, charges, rules and regulations must be just and reasonable. Section 9-250 is broader, addressing contracts, practices and classifications, as well as rates, charges, rules and regulations. Moreover, Section 9-250 looks at whether any of these are "discriminatory or preferential, or in any way in violation of any provisions of law," as well as whether they are unjust or unreasonable. Under the foregoing statutes, the central legal questions posed by the Complaint concern whether the PJM decisions have rendered the station power provisions of the Agreements unjust, unreasonable or discriminatory or placed those provisions in violation of any law.

The PJM decisions establish certain principles. First, "[t]he proper rate level for station power sold for end use is…a matter of state law." PJM II, 2001 FERC Lexis, 487, fn. 64. Second, "[a]s long as merchant generators appropriately compensate third parties for the use of any third parties' transmission and/or local distribution facilities needed for remote self-supply, we believe that merchant generators should be able to self-supply their station power requirements to the same extent as integrated utilities." PJM III, 2001 FERC Lexis 1269, at bracket 34. If this Commission, as a subordinate sovereign, is legally obligated to apply the second quoted principle while exercising the power described in the first quoted principle, then the Agreements could be considered unjust and unreasonable to the extent they contravene the legal requirement set forth in the second quoted principle. While that cannot be decided at this procedural stage, it is a cognizable question under the Act.

It follows that the Administrative Law Judge rejects, for the time being, ComEd's contention that "nothing in any of the PJM decisions stands for the proposition that a generator's otherwise lawful prior agreement to purchase station power is somehow, after the PJM decisions, unjust and unreasonable, and therefore`voidable' at the generator's option." Motion, at 9. However, this Ruling does not preclude ComEd from endeavoring to demonstrate, during the course of this proceeding, that the second quoted principle does not bind this Commission or that the FERC did not intend to apply that principle to existing contractual relationships. ComEd has not made such demonstrations yet, however.

ComEd also contends that even if Midwest's allegations can properly be addressed under the standards established by Article 9, and even if they are assumed to be true, they cannot establish that the Agreements were unjust and unreasonable "at the time Midwest and ComEd agreed to them, almost a year and a half before PJM II

was issued." Motion, at 9. The face of the Complaint sustains ComEd's position on this point. As ComEd states, the FERC's PJM decisions "are the sole basis on which Midwest claims that the [Agreements] are unjust and unreasonable" *Id*., at 8, fn. Given Midwest's allegation that the Agreements were executed in December 1999, it would be factually impossible for those Agreements to have been unjust and unreasonable because of the legal effect of FERC decisions rendered in 2001.

In a sub-heading to its Response, Midwest asserts that the PJM decisions "affirm Midwest's long-standing position" that ComEd improperly obstructed self-supply of station power. Response, at 9 (initial capitalization omitted). The duration of Midwest's position has no legal significance. Without showing that the PJM decisions have retroactive effect, Midwest cannot use those decisions to establish that ComEd's prior conduct was unjust and unreasonable.

Midwest also maintains, however, that it was, in effect, forced to enter into the Agreements because ComEd would not have otherwise consummated other agreements to sell generation facilities to Midwest. This charge, along with the subsequent issuance of the PJM decisions, provides the foundation for Midwest's refund claim, as well as for its request (in its Reply, but not in its Complaint) that the Agreements be voided "*ab initio*" Reply, at 10. ComEd responds that Midwest's coercion charge is incorrect because the Agreements were "negotiated in good faith." Motion, at 9. ComEd thus creates a factual dispute regarding the formation of the Agreements, which cannot be decided in the context of a dismissal motion.

Concerning Midwest's request to void the Agreements *ab initio*, ComEd correctly avers that the Commission is not a court of equity and, consequently, cannot grant such relief. Reply, at 11-13. In fact, the Commission is not a court at all. As a result, it has no power to adjudicate contract disputes in equity or in law. Rather, it is empowered to enforce the provisions of the Act. Therefore, while Midwest's coercion charge can provide an appropriate foundation under the Act for a claim that ComEd's negotiation practices produced unjust and unreasonable rates and obligations, the Commission lacks the authority to use that charge as a basis for voiding the Agreements retrospectively. (The remedies that *are* available under the Act are discussed in a subsequent section of this Ruling.)

It follows from the preceding discussion that the Complaint should be dismissed insofar as it asserts a claim that the PJM decisions rendered the Agreements unjust and unreasonable prior to issuance of those decisions[3]. The Motion should be denied, however, insofar as it challenges Midwest's claim that ComEd's purported negotiation tactics rendered the station power provisions of the Agreements unjust and unreasonable when executed. However, in the event that Midwest prevails with respect

[3] The parties did not address when the PJM decisions acquired sufficient finality to provide the basis for a finding of unjustness and unreasonableness under the Act. The parties should brief that question at the conclusion of evidentiary hearings in this proceeding and may each offer evidence consistent with their respective positions.

to that claim, it will be entitled only to the relief afforded by the Act, which is not co-equal with the relief that would be available from a judicial tribunal.

Anti-competitive Conduct

Midwest claims that the Agreements are anti-competitive because they impose costs on Midwest that are not borne by other power generators. Complaint, at 7. In support of this claim, Midwest alleges that "at least through the end of 2000, ComEd self-supplied station power to its nuclear generating stations," that those stations are now self-supplied by ComEd's affiliate, and that "new [independent power producers] may be allowed to self-supply station power." *Id*., at 4-5. Accordingly, in Midwest's view, the station power obligations in the Agreements contravene the pro-competitive legislative intent of Section 16-101. *Id*., at 5.

ComEd responds that the Agreements furnish Midwest with "virtual self-supply," because Midwest receives station power at the same price at which it sells power to ComEd under certain power purchase agreements ("PPAs"). Motion, at 10. As already stated, neither the Agreements nor the PPAs are yet in evidence. Moreover, ComEd's argument creates a factual dispute, which cannot be decided at this juncture.

ComEd also attacks the legal foundation of Midwest's anti-competitiveness claim. ComEd emphasizes that Section 16-101, on which Midwest relies, is merely a prefatory statement of "general policy goals and [does] not grant any specifically enforceable rights, or create any causes of action." Reply, at 9. ComEd is correct. Section 16-101 does not provide an independent basis for a complaint under the Act.

However, Section 16-101 does supply legislative guidance with respect to what constitutes unjust and unreasonable conduct under Article 9. "Unjust" and "unreasonable" are not self-defining. As the Commission has stated:

> By using such general terms as "unjust," "unreasonable" and "improper," the Legislature has left it to the Commission to determine more specifically, in the context of the actual operations of the industries we regulate, what constitutes prohibited conduct. We must do so by "considering the reason and necessity for the statute and its stated purpose." Illinois Bell Telephone v. Illinois Commerce Commission, 282 Ill.App.3d 672, 669 N.E.2d 628, 218 Ill.Dec. 485 (1996). The purposes of the Public Utilities Act are expressed throughout the Act.

Citizens Utility Board v. Illinois Bell Telephone, Dckt. 00-0043, Order, Jan. 23, 2001, at 8. In this instance, the general language in Article 9 derives specific meaning from (among other provisions of the Act) the policy declaration in Section 16-101. Consequently, proven anti-competitive conduct is unjust and unreasonable under Article 9 to the extent that it obstructs what Section 16-101 defines as a fundamental purpose

of the Act. Therefore, the Complaint has sufficient legal underpinning to withstand the instant dismissal Motion.

To be clear, this Ruling does not address the question of whether a voluntary agreement can be anti-competitive solely because it places a party at a price disadvantage relative to its competitors. At this stage of the proceeding, however, Midwest alleges that it did not enter into the Agreements voluntarily and that is enough to survive the Motion.

Refunds and Other Remedies

ComEd contends that Midwest cannot be awarded a refund of funds already paid for energy and capacity under the Agreements, even if the Complaint raises a valid claim under Article 9 of the Act. In general, ComEd insists that "Midwest lacks even a good faith factual basis for this claim for refund." Motion, at 12. More specifically, ComEd argues that Midwest has sustained no monetary harm because it has received the "economic equivalent of self-supply" under the Agreements. *Id*. Additionally, ComEd avers that the power Midwest would have ostensibly self-supplied, in lieu of power procured under the Agreements, was already committed to ComEd under the PPAs. *Id*.

The foregoing ComEd arguments are based on facts not yet in evidence. Whether the PPAs accomplish "virtual" self-supply, and whether they involve all of Midwest's energy output, cannot be determined without examination of both the Agreements and PPAs. Therefore, the Motion must be denied insofar as it asserts that the terms of the Agreements and PPAs preclude refunds.

However, there are statutory limits to any refund, or other relief, to which Midwest may be entitled based on the alleged facts. As previously discussed, the Complaint was filed under Section 10-108, which empowers the Commission to determine whether a party has violated "any provision of this Act." In this case, Midwest alleges violations of the provisions of Article 9, including Section 9-101 and Section 9-250. The available remedy under Section 9-250 is for the Commission to "determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force." By its terms, this remedy is forward-looking.

There is also a monetary remedy in Article 9, variously described in Section 9-252 as "reparations" and "damages." By either name, the remedy attaches to utility charges that are proven to be "excessive or unjustly discriminatory." Applying the terms of Section 9-252 to the instant Complaint, it cannot be determined at this procedural milestone whether any charges imposed for station power under the Agreements were excessive or unjustly discriminatory. What can be concluded at this stage (that is, from the face of the complaint) is that ComEd has furnished station power to Midwest since December 1999. Complaint, at 3. This fact will apparently not be disputed later, since ComEd agrees that "Midwest has paid for station power since December 1999…for service rendered" and adds that "Midwest would have had to pay ComEd for

transmission and distribution in any case." Motion, at 13. Accordingly, if this matter proceeds to evidentiary hearings and Commission decision, the boundaries of any monetary refund will be established and limited by the "excessive or unjustly discriminatory" standard in Section 9-252.

Netting

In the Complaint, Midwest also seeks an order requiring ComEd to net station service on a monthly basis. Complaint, at 6. ComEd counters that monthly netting is not required under PJM Interconnection, LLC, 95 FERC 61,470 (2001)("PJM IV") and is not – contrary to Midwest's claim - consistent with ComEd's FERC-approved open access transmission tariff ("OATT") or certain interconnection agreements between Midwest and ComEd. Motion, at 14-15. Midwest rejoins that netting is a "policy matter ripe for Commission consideration." Reply, at 12.

At initial glance, the Motion appears to warrant simple denial with respect to the netting issue. It is based on documents that are not in evidence (ComEd's OATT and certain interconnection agreements) and on legal theory that broadens, rather than forecloses, the netting dispute. However, for other reasons, the viability of Midwest's netting request is not evident from the face of the Complaint.

First, Midwest does not state whether netting is occurring now under the Agreements or, if it is, how present netting differs from the netting Midwest seeks. Second, Midwest does not allege, much less offer facts to establish, that any present netting practice between these parties is unjust and unreasonable. Consequently, present netting practice has no independent foundation as a subject of the Complaint. Viewed, then, as a "policy matter" apart from any claimed violation of the Act, Midwest's netting request is essentially a request for declaratory ruling that does not comply with the requirements of 83 Ill. Adm. Code 200.220.

Alternatively, the netting request can be viewed as part of the remedy Midwest seeks under Section 9-250 with regard to the future conduct of the parties. However, if Midwest were awarded its requested freedom from the station power provisions in the Agreements, it would then endeavor to self-supply station power and obtain no energy or capacity from ComEd. Complaint, at 4. To the extent that Midwest might procure station power from ComEd, it proposes netting that power against power Midwest provides to ComEd under the PPAs. *Id.*, at 6. The justness and reasonableness of the PPAs are not at issue here, however, leaving no apparent legal basis for fashioning a remedy directed, even in part, at those agreements. Finally, if Midwest does not prevail with regard to the justness and reasonableness of the station power provisions in the Agreements, there would, similarly, be no legal foundation for requiring monthly netting as the parties continued their relationship under those Agreements.

Accordingly, the portions of the Complaint requesting monthly netting (paragraphs 11 and 12) do not state a claim for which relief can be granted. Midwest may, if it chooses, seek leave to amend its Complaint with respect to this issue only.

Arbitration

ComEd also states that Complaint should be dismissed because each Agreement contains a mandatory arbitration clause. Motion, at 8. In ComEd's view, "Midwest alleges no factual reason why this provision is unenforceable." *Id*. However, since the Agreements have yet to be presented as evidence, the existence of the purported arbitration clauses, as well as their specific terms and exceptions (if any), cannot be determined in the context of the instant dismissal Motion.

That said, some additional comments on this issue are warranted. Although the parties dispute whether the Complaint falls within the ambit of the purported arbitration clauses, e.g., Response, at 8-9, and Reply, at 13-14, there is insufficient argument concerning either the effect of an arbitration clause on Commission jurisdiction or prior Commission practice (such as abstention) when an arbitration provision is asserted[4]. Nor do the parties adequately discuss how an arbitration provision is enforced – that is, (among other issues) whether the Commission can enforce such a provision or whether the party asserting it must sue on the contract in civil court.

Midwest simply declares that the Commission has "primary jurisdiction," but does not elaborate upon that declaration. ComEd goes further, asserting that under subsection 16-116(b) the Commission cannot "alter or waive[5]" an arbitration provision that is part of an agreement for contract services. Reply, at 14. Assuming for the sake of argument that ComEd is correct on this point, the question of whether the Commission must therefore defer to an arbitration provision, particularly when matter within its jurisdiction (such as tariffed services[6]) is involved in the dispute, remains unanswered.

Accordingly, while the Motion is denied insofar as it seeks dismissal based on the purported existence of arbitration clauses in the Agreements, ComEd is not precluded from raising this issue again when the terms of the Agreements have been placed before the Administrative Law Judge.

[4] Additionally, the Commission has recently been authorized by subsection 10-101.1(e) to conduct arbitration of disputes brought under the Act, when requested by all parties.

[5] The actual language of subsection 16-116(b) is "…alter or *add to* the terms and conditions..." (Emphasis added.)

[6] Subsection 16-116(b) bars the Commission from altering or adding to the terms and conditions for the utility's *competitive services*. The primacy of an arbitration provision when an agreement encompasses both competitive and non-competitive services is not apparent from the face of the statute and not settled by the arguments of the parties.

Summary

The Motion is granted in part and denied in part, as stated above.

Subsequent Procedural Steps

In view of the time spent to prepare this Ruling, the procedural schedule in this proceeding must be altered. At the next scheduled status hearing, on October 29 2001 at 11:00 am, the parties should present proposed schedule revisions. These proposals should, to the extent practicable, preserve the intervals between events that were established in the existing schedule.

The Administrative Law Judge notes ComEd's statement that it is "willing to consider modifying or terminating the [Agreements] and allow Midwest to take delivery services in accordance with the non-discriminatory terms of its delivery services tariffs filed under Illinois and federal law." Motion, at 4. The Administrative Law Judge is amenable to holding this proceeding in abeyance if the parties want to enter into negotiations concerning their future relations.

DG:jt